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## Potential Cost Savings In Public Defender Conflict Cases: Study and Findings

December 27, 1990



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## EXECUTIVE SUMMARY

In mid-1989, members of the Board of Supervisors expressed interest in whether a more cost effective vehicle could be found to deliver indigent defense services for the conflict of interest cases referred to the Alameda County Bar Association for handling. Although only about ten percent of all Public Defender cases are rejected for ethical conflict reasons, the costs of the Alameda County Bar Association Bar contracts have far exceeded ten percent of the indigent defense budget. Since 1982, expenses have increased at an average of 16 percent per year.

In calendar year 1989, Alameda County paid members of the Bar Association \$3,330,459 for handling 7,966 cases under the criminal and dependency contracts. For calendar year 1989, the Bar contract ran an average cost per case of \$418. By comparison, the Public Defender's Office handled 58,916 cases in fiscal year 1989-90 with a net county cost of \$14,107,411 or \$239 per case. By 1991 the Bar average cost per case will have risen to \$473 per case. These numbers strongly suggest that even a small scale Public Defender operation will deliver effective defense services at a smaller unit cost than the present appointed counsel system administered by the Bar.

In the opinion of the Public Defender, the question of feasibility for an alternative conflict defense agency has always been a function of scale. There is a "critical mass" at which the conflict's caseload can most cost effectively be handled by a Public Defender pattern of representation. The number of conflicts' cases assigned pursuant to the Bar Contracts in the twelve month period ending 1989 is equal to all cases assigned the Public Defender for the 1963 calendar year. The critical mass point, at which an Alternate Public Defender office (which we will call the Alternate Defense Unit) could successfully handle most of the Public Defender conflict cases at lower cost, has been reached in Alameda County. The remaining questions concern policy issues only, not feasibility or cost effectiveness.

At present, the Bar contracts are a pure "vertical" representation system (one case to one lawyer). Because each assigned lawyer is paid according to a fixed fee schedule, it is impossible as a practical matter to contain costs whenever the caseload increases, as it has consistently over the last decade. Such a system automatically costs more as more cases are referred to it. A well run Public Defender system, as in Alameda County, can be budgeted in the conventional way and, under normal circumstances, can be expected to live within its budget, as the Alameda County Public Defender consistently has over the last decade. Such a Public Defender model is relatively insensitive to caseload increases.

The classic Public Defender model works at its best when certain conditions are met: (1) The cases that are "team handled" are geographically compact. (2) The lawyers are well trained, experienced, and accountable to supervision. (3) The volume of cases

## EXECUTIVE SUMMARY

The following summary of the results of the research project is intended to provide a brief overview of the findings and conclusions of the study. The research was conducted in order to determine the extent to which the use of the proposed system would result in a significant improvement in the efficiency of the existing system. The results of the study indicate that the proposed system would result in a significant improvement in the efficiency of the existing system, and that the use of the proposed system would result in a significant improvement in the efficiency of the existing system.

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to be handled is large enough to keep the team lawyers busy. These principles were used in the design of the Alternate Defense Unit (ADU).

In his Board letter of December 22, 1989, which recommended the renewal of the Bar criminal contract through December 31, 1991, County Administrator Steve Szalay indicated that a report and recommendations would be submitted by his office for alternatives to the Bar contracts. At that time, the CAO and Public Defender were actively engaged in a careful feasibility study for such a proposal.

The study began with an exhaustive analysis of all Bar costs for calendar 1989. An accurate portrait of the Bar Association caseload by judicial jurisdiction throughout the county was assembled. The costs associated with these cases allowed reasonable projections to be made for the calendar year 1991.

The Bar Association's 1989 caseload data was carefully examined to determine if there were any geographical areas which had a high enough volume of cases to justify application of the Public Defender model. Data from each jurisdiction were analyzed in order to determine if any location had the promise of substantial savings through economies of scale. Oakland Superior Court, Oakland-Piedmont-Emeryville Municipal Court and Berkeley-Albany Municipal Court clearly qualified. All three jurisdictions have high caseload volumes, grouped in a tight geographical area which could be served by one central office.

This study fully supports the feasibility and cost effectiveness of the creation of an Alternate Defense Unit (ADU) to handle the Public Defender cases now being referred to the Bar contract attorneys in the three identified court systems. The Alternate Defense Unit project, designed on the Public Defender branch office model, would have a small number of attorneys primarily assigned to each court (a director and nine other lawyers total). These lawyers would be flexibly staffed to handle all conflict cases occurring in each court within the Oakland and Berkeley Municipal Court and Superior Court jurisdictions in much the same way as the Public Defender presently does. There would be a support staff of stenographers, clerks and investigators (eight positions).

In our projections for calendar 1991, the ADU would handle 2,679 cases in municipal court (over 50% of the total and 1,341 cases in Superior Court (over two-thirds of the total). The total projected caseload of 4,020 would be done at an average cost of \$366 per case for that targeted caseload. The Bar Association cost would be \$446 per case for the identical caseload were there no Alternate Defense Unit. Even greater savings will occur if the Alternate Defense Unit assumes administration of the remaining Bar cases.

The Alternate Defense Unit would be fully capable of administering the remainder of both Bar Association contracts. This is projected at 5,602 total cases (both criminal and dependency). We have proposed that, effective on the expiration of the current Bar





criminal contract on December 31, 1991, the Alternate Defense Unit assume full responsibility for administration of the court appointed program. Significant ongoing savings would result were the Alternate Defense Unit permitted to handle all administration activity for the remainder of the Bar contract. The unit as staffed is fully equipped to assume the entire administrative burden of the Bar contract without any additional appropriations. The county presently pays the Bar \$178,015 for administration of the Bar contract.

The ongoing annual cost of the Alternate Defense Unit would be \$1,469,683. First year costs, including \$170,000 of one-time start-up costs, would be \$1,640,422. There would be a net savings of \$62,926 in the first year if one-time start-up costs were funded from existing trust funds. After the first year, we have projected ongoing savings of \$502,530 annually. More importantly, this figure will increase as the conflict caseload increases.

The projected savings take into account that Bar contracts' costs for the assignment of appointed attorneys to cases would be reduced but not eliminated. Bar attorneys would continue to handle the death penalty cases. Bar attorneys would also continue to handle the cases from the Municipal Courts of San Leandro-Hayward, Fremont-Newark-Union City, and Livermore-Pleasanton-Dublin. Bar lawyers would also continue to be assigned to all Juvenile Court conflict cases, both regular "criminal" and civil (300) cases. The Bar attorneys would continue to be appointed in the much smaller number of so called "tertiary conflict cases" originating in Oakland and Berkeley.

Appended to the study are a number of spread sheets, generated by Data Processing. The principal findings derived from the data are summarized in the report. A number of significant policy issues are raised by the Alternate Defense Unit project. Several of these policy issues are addressed in the Conclusion.



## SECTION I

### INTRODUCTION AND BACKGROUND

This section covers the background to the study, including a brief description of the historical setting and the present contracts with the Bar Association. It also discusses the fundamental difference between the Bar Association's approach and that of the Public Defender.

#### INTRODUCTION

The purpose of this study is to identify areas of potential cost savings/cost avoidance in the handling of indigent defense cases by private attorneys in conflict situations. The county presently has two contracts with the Alameda County Bar Association. One to provide attorneys for indigent criminal defendants and one for adults or juveniles in dependency cases whenever the Public Defender has a conflict of interest. At the time the Board of Supervisors approved the 1990/91 Bar "criminal" contract, it directed the County Administrator's Office and Public Defender's Office to study costs associated with these contracts and propose alternatives. The costs have risen at an average of over 16 percent per year since 1982. In fiscal 1982/83, the total expense under the contracts were \$1,300,200. By fiscal 1989/90, that cost had risen to \$3,792,670.<sup>1</sup> These rising costs have been due primarily to the ever increasing caseload of the Public Defender's Office. As the gross case load increases, the number of conflict situations also increase.

#### BACKGROUND

Every person charged with a crime is entitled to be represented by an attorney. If the person is poor and cannot afford an attorney, the courts and thus the county, must provide one for him/her. Alameda County, like virtually all urban counties in California, has chosen to deal with this expense by creating a Public Defender's Office. Due to the high volume of cases and consequent economies of scale, Public Defender operations routinely show the lowest "cost per case" of any indigent defense model. In fiscal year 1989/90, the Public Defender's Office handled 58,916 cases or 483 per attorney at a net county cost of \$14,107,411. This resulted in an average cost of \$239 dollars per case.

Occasionally the Public Defender must reject an indigent as a client due to a "conflict of interest." This occurs any time the representation of one individual would jeopardize the rights of another Public Defender client. For example, if two individuals were charged with committing a robbery, the Public Defender could ethically only

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<sup>1</sup> All other data in this report is based upon calendar years since the contract with the Bar Association is based on calendar years.





represent one of the two individuals. There were approximately 7,966 such "conflict cases" in calendar year 1989, with a total cost of \$3,330,459. The average cost per case was \$418.<sup>2</sup>

Up until the mid-1970's, private attorneys were appointed by individual judges to represent people who by reason of this "conflict of interest" could not be represented by a Public Defender. Under this direct judicial appointment system, it was perceived that there were no effective cost controls and no method of fairly distributing cases throughout the Bar membership. Thus, in the mid-1970's the county began contracting with the Alameda County Bar Association to provide panels of attorneys who would be appointed on a rotating basis and paid according to a fee schedule. The contract system had immediate benefits. Fees were uniform and predictable to the extent that a reasonable budget could be prepared. Furthermore, the work was spread amongst Bar practitioners in an evenhanded manner. In the mid-70's costs were held to a few hundred thousand dollars.

The County presently has two contracts with the Bar Association. The "criminal" contract groups all criminal cases into six categories according to seriousness. These are: SC (special circumstance or death penalty cases) and classes one through five with one being the more serious and five the least serious. There is also a "civil" contract which almost always involves Welfare and Institutions Code 300 cases; more commonly referred to as dependent children cases. These cases concern neglected and/or abused children that the state is seeking to remove from the parents' control and custody. Each class has an attendant fee schedule with a base fee and additional fees for significant other work. The Bar Association's administrative duty is to act as a clearing house in order to parcel out the cases to attorneys who are members of the local Bar and had been approved to participate in the program. As indicated, the Bar received \$161,981 for performing these administrative duties in 1989.

In contrast with other counties Bar contracts for handling conflicts' cases this arrangement has worked well. The county has taken a conservative approach with the Bar Association in contract fee negotiations and the resulting fee arrangements have, in general, represented good value to the county. Rising caseloads and costs require the County to examine alternatives to the present arrangement. This report focuses on the differences between the Public Defender model and the Bar contract model.

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<sup>2</sup> Note the Bar Association counts some felony cases "twice" by billing for both the municipal court part of a case and the superior court part. Their "cost per case" would be substantially higher if cases were counted only once--the same way that the Public Defender does.



## DIFFERENCES BETWEEN THE PUBLIC DEFENDER MODEL AND THE BAR CONTRACT MODEL

Throughout the state there are two fundamentally different approaches to delivering indigent defense services. In one approach, a separate attorney, sometimes from a list, is simply assigned to an individual client. That lawyer may have a case-load of many cases, but whatever calendaring conflicts, delays or other resulting inefficiencies, he or she simply covers what needs to be done. This model is usually called vertical representation. In the second approach, large volume courts are staffed with lawyers who handle clients' cases and files as they appear each day and pass those same clients and files to other teams of lawyers. This model is usually called horizontal representation. In the real world, aspects of vertical representation necessarily must be integrated into any horizontal representation system. Such an integrated or hybrid system, with a strong emphasis on horizontal representation, is what is referred to as the basic Public Defender model. In Alameda County, for example, while most cases are handled by the team or horizontal approach, trial cases are preassigned to individual lawyers (more than 95% of cases are not trial cases) and all murder cases are individually assigned in the vertical model.

The Bar Contract is a pure vertical representation system. Because each assigned lawyer is paid according to a fixed fee schedule, it is impossible as a practical matter to contain costs whenever the caseload increases, as it consistently has over the last decade. A well run Public Defender system, as in Alameda County, can be budgeted in the conventional way and, under normal circumstances, can be expected to live within its budget, as this office consistently has over the last decade.

The basic Public Defender model works at its best when certain conditions are met: 1) The cases that are "team handled" are geographically compact. 2) The lawyers are well trained, experienced, and accountable to supervision. 3) The volume of cases to be handled is large enough to keep the team lawyers busy. These principles can be used in the design of a cost effective Alternate Public Defender Office to handle conflict cases in Alameda County.

Last year the Public Defender met with the Governing Board for the Bar Contract Conflicts' Panel and described how the Bar could reorganize its approach to its task to imitate the Public Defender model and take full advantage of the available economies of scale. To date, this discussion has born no fruit. The Bar Association, because of the perceived necessity of distributing business among Bar members, may well be locked into its current organizational structure.





## SECTION II

### STUDY METHODOLOGY AND DISCUSSION OF CASELOAD DISTRIBUTIONS AND COSTS

This section describes the methodology used to study the problem and provides some insights into the distribution and costs of conflict cases throughout the county. The discussion summarizes the data in Exhibit 3, which is a set of spreadsheets detailing 1989 case costs and distribution.

#### NATURE OF STUDY

The study has three major components. First, it was necessary to completely understand the nature of costs associated with the Bar contract. A thorough examination of all billings presented by Bar panel members for a substantial period of time was needed. Calendar year 1989 was chosen since it provided the most recent and complete year of information and the caseload was not unique. Furthermore, the time period paralleled the Bar contract which runs on a calendar year. Bar Association costs for adult criminal and dependency cases in 1989 were examined by judicial jurisdiction in order to obtain a clear picture of the aggregate caseload. Particular attention was paid to the type of case, cost associated with it, and the jurisdiction in which it occurred.

Second, with a clear picture of the caseload by jurisdiction, an Alternate Defense Unit model was applied to determine whether and where significant cost savings could be generated.

Third, assuming that an Alternate Defense Unit showed promise, it would then be necessary to carefully explore the costs associated with that model. These costs include ongoing expenses, one-time start-up costs, and carry-over costs. Carry-over or "pipeline" costs are those associated with the process of converting from a contract system to the alternative.<sup>3</sup>

#### ANALYSIS

In the early spring of 1990, an exhaustive analysis of Bar Association caseload broken down by class of case and geographical location was undertaken. Exhibit 1 is a computer summary of every bill submitted by Bar Association attorneys in calendar year 1989. Exhibit 2 is a computer summary of the Bar workload contained within those bills and a summary of the billed amounts. Exhibits 1 and 2 are thus a measure of the type of work performed by the Bar Association in each jurisdiction, as well as

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<sup>3</sup> See detailed discussion under section V entitled "Bar Contract Carry-over Costs."



the cost associated with that work. Exhibit 3 is a series of spreadsheets summarizing and combining the data in exhibits 1 and 2.

Exhibit 3 provides all the key elements necessary to determine the cost saving effectiveness of any program based on the Public Defender model. Several issues are critical for such a model. There needs to be a relatively high volume of cases in the target jurisdiction(s). Ideally the caseload mix should involve routine cases which only rarely have extensive hearings or trials. Finally, the geographical dispersion of cases is critical. Economies of scale can be quickly diluted if remote jurisdictions must be serviced by one centralized office or if more than one office must be created. For example, it could easily require a half a day for an attorney from a downtown Oakland office to service two cases in a Fremont court. With these elements in mind, all of the jurisdictions in Alameda County were reviewed and are analyzed below.

### SUPERIOR COURT

Almost all of the conflict cases handled by the Bar Association in Superior Court are heard in the North County Courthouse. Superior Court is the single most expensive operation with billings of \$1,041,165 on 1,502 cases in 1989. This figure includes the 14 death penalty (special circumstance) cases with a total cost of \$298,138. Reviewing Superior Court data provides several insights:

- The simpler Class 2 and Class 3 felonies accounted for nearly 92 percent of the case load in Superior Court.
- Over half of the new cases arriving in Superior Court in 1989 were certifications following a guilty plea in Municipal Court. These usually required only a single appearance for sentencing.
- Death penalty cases (SC), though less than one percent of the total caseload, cost \$298,138 in Superior Court alone. Expenses for the cases are growing rapidly. The 1990 projections are nearly \$500,000.
- The most expensive cases were those which proceeded to a full jury trial. Not including, death penalty cases, only 39 cases were tried by conflict's counsel in 1989.<sup>4</sup> These cases required approximately 400 days of jury trial time.

A Public Defender style operation would clearly function well in Superior Court. The public defender model produces cost savings due to the economies of scale which are

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<sup>4</sup> Data from hand tally of all Superior Court jury trials for 1989 calendar year.





inherent when a few lawyers handle many cases. These kinds of economies occur when there are large numbers of relatively uncomplicated cases which have a high total expense. This is the portrait we see in Superior Court. Fifty percent of the new cases arriving are certifications and thus involve only a single appearance. Over 90 percent of the remaining cases are the simpler Class 2 and Class 3 felonies. Finally, of the 1,435 cases handled by the Bar in 1989, only 39 went to jury trial. If there were a significantly higher number of trials, more staff would be required either by a public defender operation or a Bar contract model, thus raising the cost in each case. Since death penalty cases normally proceed to trial, their expense is very high. Economies of scale are unlikely in this type of case.

## JUVENILE COURT

Juvenile Court, a subdivision of Superior Court, sits in two divisions. One in downtown Oakland (Juvenile West) and the other at Fairmont Drive (Juvenile East). Juvenile cases are divided into two broad categories -- quasi-criminal and child dependency. The quasi-criminal cases involve children charged with conduct which would be criminal if committed by an adult, while the child dependency cases (cases filed by Social Services under Welfare & Institutions Code 300) are cases where children are being taken out of the care and custody of one or more parents. These 300 proceedings are often quite protracted and involve multiple lawyers. As many as one for each parent and each child. In 1989, \$784,995 was spent on 2,231 cases in Juvenile Court for all operations.<sup>5</sup> The Bar handles these "civil cases" under a separate contract due to expire on June 31, 1991.

The examination of the 1989 data associated with Juvenile Court provided the following information.

- W&I 300 cases were the largest component of Juvenile Court costs with over \$466,501 in bills for 1989.
- W&I 300 cases involved the most extra work charged for in addition to the Bar Association base fee. There were 1,280 "additional sessions" of juvenile hearings billed for in 1989. The costs associated with 300 cases are among the fastest growing of court appointed attorney's expenses.
- The "quasi-criminal" cases involved significant fees of \$294,797 and a caseload of 811. They were, however, spread between two geographical areas.

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<sup>5</sup> This figure includes costs associated with both Juvenile Courts and \$29,952 of "300 case costs" which the Bar inadvertently associated with Superior Court operations.



Juvenile Court offers both promises and problems. The rapid growth in 300 W&I cases and high cost argues for the "Public Defender approach." The high volume would provide full-time work for a few attorneys handling several cases a day. On the other hand, two geographical locations would make it more expensive and much more difficult to service. This report will not recommend that the Juvenile Court be included in any pilot project at this time.

## MUNICIPAL COURTS

There are six separate municipal courts in Alameda County. They are as follows: Alameda, Berkeley-Albany, Fremont-Newark-Union City, San Leandro-Hayward, Oakland-Piedmont-Emeryville, and Livermore-Pleasanton-Dublin. Alameda and Livermore-Pleasanton-Dublin Municipal Courts are both small courts with limited conflict caseloads. The Bar handled 116 and 139 cases respectively in 1989. The combined billings from these courts involved about \$75,000. Fremont-Newark-Union City and San Leandro-Hayward Municipal Courts are larger municipal courts. In Fremont-Newark-Union City Municipal Court there were 813 cases in 1989, while San Leandro-Hayward Municipal Court had 683. Billings from Fremont-Newark-Union City Municipal Court were \$208,455 and San Leandro-Hayward Municipal Court was \$218,917. Berkeley-Albany Municipal Court had 718 cases in 1989 with a total cost of \$256,296, while Oakland-Piedmont-Emeryville Municipal Court, by far the largest court, handled 1,764 cases at a cost of \$612,481. The following chart summarizes the Municipal Court data:

### ALAMEDA COUNTY MUNICIPAL COURTS

JURISDICTION	CASES	COST	PERCENT FELONY	PERCENT MISD.	COST PER CASE
Alameda	116	\$ 36,432	62%	38%	\$314
Berkeley-Albany	718	\$256,296	45%	55%	\$357
Fremont-Newark-Union City	813	\$208,455	24%	76%	\$256
San Leandro-Hayward	683	\$218,971	32%	68%	\$321
Oakland-Piedmont-Emeryville	1,764	\$612,481	56%	44%	\$347
Livermore-Pleasanton-Dublin	139	\$ 38,634	31%	69%	\$278





The data provides some clear insights into municipal court caseloads:

- The small municipal courts (Alameda and Livermore-Pleasanton-Dublin) had a low volume of cases with a low cost per case associated with them.
- The South County Municipal Courts (Fremont-Newark-Union City and San Leandro-Hayward) had a caseload mix shifted toward the "lightest" end of the criminal case spectrum. Three-quarters of the cases in Fremont-Newark-Union City Municipal Court were misdemeanors and the vast majority of felonies were the simplest Class 3 type. Sixty-eight percent of San Leandro-Hayward Municipal Court's caseload was composed of misdemeanors. Of the remaining felonies, most were Class 3.
- Berkeley-Albany Municipal Court, while similar in volume to Fremont-Newark, Union City and San Leandro-Hayward Municipal Courts had a much higher percentage of more serious cases. One-half of the caseload was comprised of felony cases and, of that group, about one-quarter were the more serious Class 1 and Class 2. This type of workload resulted in significantly increased billings.
- Oakland-Piedmont-Emeryville Municipal Court had the most serious caseload. Fifty six percent of the cases were felonies and, of this group, about two-thirds were Class 3, while the remaining one-third were the more serious cases of Class 2 or above.

## FINDING

The purpose for this extensive review was to identify those areas where a Public Defender model using economies of scale could best be implemented. A few of the jurisdictions clearly fit the criteria of high volume, uncomplicated cases in a tight geographical area. They are Oakland-Piedmont-Emeryville Municipal Court, Berkeley-Albany Municipal Court, and Superior Court. Over 60 percent of the Bar contract for 1989 (\$1,909,942) was spent in these three locations. To some degree, juvenile court also matches the criteria, but for reasons to be discussed, it is not being recommended as part of a pilot project at this time. An Alternate Public Defender unit operating in Berkeley-Albany Municipal Court, Oakland-Piedmont-Emeryville Municipal Court and Superior Court would have a number of advantages:

- All three courts have a high volume of cases which is needed for the Public Defender model to work well. This environment ensures that economies of scale will produce the greatest savings.
- The courts are located quite close to one another which would minimize travel time and allow all three to be serviced from a central office, thereby minimizing overhead expenses. Clients would not be inconvenienced by being asked to travel large distances for the purposes of interviews or consulting with their attorneys.



- Attorney staff could be rapidly shifted from one location to another to cover day-to-day imbalances.
- The caseload involves a high percentage of felonies which are among the more expensive cases the Bar handles. Though there is some trade-off due to increased complexity, the savings will be greater.

By contrast, the courts in southern Alameda County do not offer similar advantages. The courthouses are separated by substantial distances, the caseloads are shifted toward the simpler and therefore cheaper misdemeanor or less complex felony end of the spectrum and it would be more difficult to service them from a single office located near the Oakland government complex. Only about 15 percent (\$466,060) of the 1989 Bar costs occurred here.

Juvenile Court offers both opportunities and risks. In calendar year 1989, \$784,955 (25 percent) of the Bar costs were spent in these operations. Juvenile is not being recommended as a part of the pilot program since it would involve servicing an additional two geographical locations and over half of the cases require expertise in W&I 300 matters which is a significantly different area of the law. Expansion of ADU operations to Juvenile Court should be reviewed once the Pilot Project has proven it's effectiveness.

Death penalty cases indicate little potential for savings. Even though 11 percent of the Bar contract (\$347,870) was spent on these cases in 1989, there are few, if any, potential for savings through an economy of scale approach. Death Penalty cases involve protracted litigation leading to long jury trials (these trials often last for months). These cases are so time intensive that they tend to completely dominate the practice of lawyers who are assigned to them.





## SECTION III

### DESIGN AND OPERATION OF PILOT PROJECT

This section discusses the design and operation of a pilot project and shows how it relates to the caseload that remains with the Bar. This discussion includes cost, workload projections and staffing needs.

#### RELATION BETWEEN ALTERNATE DEFENSE UNIT AND BAR ASSOCIATION

The analysis of the 1989 Bar Association caseload gives a clear picture of both the nature and quantity of conflict cases handled by the Bar in 1989. In order to design and prepare cost estimates for an Alternate Defense Unit capable of handling all of the cases in the core area of Berkeley, Oakland, and Superior Court, it was necessary to project the '89 caseload into 1991 figures. Exhibit 4 is a projection of 1991 conflict caseloads throughout Alameda County. It assumes that each jurisdiction will increase caseload by ten percent in 1990 and 1991.<sup>6</sup> Exhibit 5 takes the projected caseload figures and costs them out at the present Bar average cost per case. It also increases the average cost per case by six percent per year for 1990 and 1991 since the Bar receives a COLA each year. Exhibit 5 projects a 1991 year end cost with no Alternate Public Defender pilot project of \$4,550,371<sup>7</sup>. This breaks out as follows:

Criminal cases (no death penalty)	\$3,160,601
Juvenile (civil)	\$ 650,283
Death penalty cases (SC)	\$ 561,472
Bar administration cost	<u>\$ 178,015</u>
TOTAL	\$4,550,371

The Alternate Defense Unit pilot project is designed on the Public Defender model. It would have a small number of attorneys flexibly assigned to each court in the pilot project. These lawyers would handle all conflict cases occurring in that court in much the same way as the

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<sup>6</sup> The rate of conflict case increases through the 1980's was measured in three different ways. The average caseload increase was 10.08 percent using the mean method. It was slightly higher with one of the other methods and slightly lower with a third method.

<sup>7</sup> Present projections show that the Bar may overrun the 1990 contract by \$210,000 which would raise the cost to \$4,760,378.



Public Defender presently does.<sup>8</sup> There would be a support staff of stenographers, clerks and investigators. Based on exhibit 5 projections, the pilot project would handle 2,679 cases in municipal court (over 50% of the total and 1,341 cases in Superior Court (over two-thirds of the total). The unit would also be responsible for administering the remainder of the Bar Association contract. The county presently pays a total of \$178,015 for both the criminal and dependency contracts. The chart below summarizes the costs with and without an Alternate Defense Unit in 1991.

**CALENDAR YEAR 1991 COST COMPARISON**  
(Startup and Carry-over Cost Ignored)

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	COST WITHOUT ALTERNATE DEFENSE	COST WITH ALTERNATE DEFENSE
Criminal Cases	\$3,160,601	\$1,365,854
Death Penalty	561,472	561,472
"Civil Cases"	650,283	650,283
Bar Administration	178,015	0
Alternate Defense	<u>0</u>	<u>\$1,469,683</u>
TOTAL	\$4,550,371	\$4,047,292

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These figures were proposed based on an assumption that the pilot project started on January 1, 1991. A more realistic start date is July 1, 1991 (see discussion under Alternate Defense Unit Start Date).

The Bar Association would continue to handle all cases from the southern Alameda County Municipal Courts and Alameda Municipal Court. The Bar would also continue to handle all cases in Juvenile Court both "criminal" and "civil" and any death penalty case regardless of its point of origin. The Bar Association would also handle tertiary or third conflicts which arise in the Berkeley or Oakland Municipal Courts or the Superior Court (see discussion of third conflicts in Section V.

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<sup>8</sup> In a few cases, the Alternate Unit would also have a "conflict of interest." For example, if three defendants were jointly charged, the Public Defender would handle the first, the Alternate Unit the second, and the third would be referred to the Bar, much as the present system.



Projections for calendar year 1991 show that there would still be \$2,577,609 paid to Bar Association attorneys for these cases in that year.<sup>9</sup> The chart below summarizes the number of cases by jurisdiction and costs associated with them.

#### CASES REMAINING WITH BAR ASSOCIATION 1991

JURISDICTION	NUMBER OF CASES	"THIRD CASES"	COST
Alameda Municipal Court	141	0	\$ 49,632
Berkeley Municipal Court	0	145	58,194
Fremont-Newark-Union City Municipal Court	983	0	283,104
San Leandro-Hayward Municipal Court	826	0	297,360
Oakland-Piedmont-Emeryville Municipal Court	0	179	69,910
Livermore-Pleasanton-Dublin Municipal Court	<u>168</u>	<u>0</u>	<u>\$ 52,416</u>
TOTAL	2,118	324	\$810,616
Juvenile East "Criminal"	438	0	174,762
Juvenile East "Civil"	492	0	197,292
Juvenile West "Criminal"	549	0	203,679
Juvenile West "Civil"	<u>1,221</u>	<u>0</u>	<u>452,991</u>
TOTAL	2,700	0	\$1,028,175
Superior Court:			
South County	347	0	\$ 114,857
North County	<u>0</u>	<u>113</u>	<u>62,489</u>
TOTAL	347	113	\$ 177,346
GRAND TOTAL	5,165	437	\$2,016,137

#### ALTERNATE DEFENSE UNIT DESIGN

Exhibit 6 shows the complete budget picture for the Alternate Defense Unit pilot project. This Unit would have a staff of 18 full-time employees and a projected caseload in 1991 of 4,020. First year costs, including all start-up costs, would be \$1,640,422. Ongoing costs would be \$1,469,683.

In 1991 the pilot project would handle \$1,972,213 worth of Bar work including both cases and administrative costs. The first year of operation would show little or no

<sup>9</sup> This figure includes \$2,016,137 for attorney fees in non-death penalty cases and \$561,472 for attorney fees in death penalty cases.





savings due to two factors. First there will be some carryover or pipeline costs which are for work the Bar is presently assigned and has not yet billed. These are estimated at \$438,865 (this is an upper range estimate--all figures used are based on a conservative or worst case analysis). See discussion in Section V. Second, there are some start up costs for furniture, computer equipment, books, etc. Most of these could be defrayed with existing trust fund money (so called "Cortese funds") but about \$70,000 are general fund monies. There would be a net savings of \$62,926 ignoring the "Cortese" fund costs and ongoing savings of \$502,530 per year. This figure will increase as the conflict caseload increases.

The 1989 Bar Association workload in Berkeley Municipal Court, Oakland Municipal Court, and Superior Court was carefully analyzed to determine the number of staff attorneys that an Alternate Public Defender operation would need to handle the indicated workload. The pilot project should be able to process cases with much the same or greater efficiency as the Public Defender's Office. The attorneys in the Alternate Unit should be able to control their own calendars and can maximize their efficiency by scheduling some appearances to coincide with other appearances. Exhibit 9 is an analysis of workload components in each court jurisdiction. The 1989 actual workload components are listed and projections for 1990/91, based on ten percent case increases, are included. The 1991 average per day and per week shows the "normal" day and week in each jurisdiction. Workload is also broken out by misdemeanor and felony groupings in the municipal courts. The following chart shows the number of new cases and key appearances each day in 1991.

#### NEW CASES AND KEY APPEARANCES PER DAY 1991

JURISDICTION	NEW MISD CASES	MISD.PRE- TRIALS	MISD. SENTEN- CING	NEW FELONY CASES	FELONY PRE- TRIALS	FELONY PXs
Berkeley-Albany Municipal Court	1.6	1.5	1.0	1.3	1.5	.4
Oakland- Piedmont Municipal Court	3.5	3.0	1.9	4.4	4.7	1.3
	New Felony Cases	Certifica- tions for Sentencing		Pretrials		Sentencing
Superior	1.7	2.3		1.7		1.7



## DISTRIBUTION OF STAFF

The workload analysis dictated that attorney staff would be allocated as follows:

### SUPERIOR COURT:

Four attorneys per day, one covering all normal calendar appearances, felony sentencing and probation violations. Three others handling all scheduled felony jury trials with the fourth available to handle some trials if the other three are unavailable.<sup>10</sup>

### OAKLAND-PIEDMONT-EMERYVILLE MUNICIPAL COURT:

Three and one-half attorneys per day, two covering felonies and one and one-half covering misdemeanors. Oakland can expect some attorney help from Superior Court if only one lawyer is in trial there.

### BERKELEY-ALBANY MUNICIPAL COURT:

One and one-half attorneys per day covering all cases.

### OFFICE STAFF:

One director will handle administrative oversight and Bar contract supervision as well as courtroom backup as needed.

One and one-half FTE law clerks handling all motion preparation.

## STAFFING COMPARISON

This staffing allocation was tested by comparing it to actual Public Defender staffing and caseloads in Berkeley-Albany and Oakland-Piedmont-Emeryville Municipal Courts and Superior Court during 1990. The following chart shows the Public Defender caseload in each of those

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<sup>10</sup> In March of 1991, the Superior Court will change to a new system involving three groups of judges doing quasi-direct calendaring. The goals of this arrangement are to reduce the delay in resolving cases and ultimately to try fewer cases. The Superior Court does not expect any negative impact on staffing for the District Attorney, Public Defender, or presumably the pilot project. Only time will tell if this is correct. A reduction in delay and in numbers of jury trials would make staffing superior court easier than at present. An increase in jury trials would make it more difficult.

In January of 1991, Oakland-Piedmont-Emeryville Municipal Court will experiment with some direct calendaring. The impact is difficult to predict but it should allow Alternate Defense Unit Attorneys to more efficiently calendar their appearances.





jurisdictions and the number of attorneys handling the work which generates a figure for average cases per attorney. The staffing for the pilot project is then compared with this.

### AVERAGE CASELOAD COMPARISON FOR ALTERNATE DEFENSE UNIT AND PUBLIC DEFENDER

JURISDICTION	1990 PD CASES	NUMBER OF PD ATTYS.	AVERAGE	CASES PILOT PROJECT	NO. OF PILOT PROJECT ATTYS.	AVERAGE
Berkeley-Albany Municipal Court	6,568	6	1,095	724	1.5	483
Oakland-Piedmont Municipal Court	16,257	28	581	1,955	3.5	559
Superior Court	10,226	25	409	1,341	4	335

A review of the chart shows that in all cases the pilot project staff load is below actual public defender caseload per attorney in 1990. This is important for two reasons. First, it shows that staffing of the Alternate Unit is adequate. Second, the unit should be able to absorb some increase in caseload without any staff increase. This translates into significant increases in savings.

A third "qualitative" analysis was done of cases occurring in the three jurisdictions. Cases were selected randomly from each jurisdiction and reviewed in the CORPUS system. The number and nature of each court appearance associated with these cases was studied to determine workload intensity. Public Defender cases involving substantially similar charges with similar conditions were reviewed to determine if there was any significant differences in workload activity. As expected, Bar Association practice and Public Defender practice are similar on a case-by-case basis. A burglary handled by an appointed Bar attorney was conducted in very much the same manner as the Public Defender. This review showed no reason to suspect that Bar cases were somehow qualitatively different than a normal Public Defender caseload.

### ALTERNATE DEFENSE UNIT PERSONNEL

The workload analysis also made it relatively easy to project the type of staff needed by the Alternate Defense Unit. The following is a brief job description for professional and support staff:

One director of Alternate Defense whose job would be to supervise and coordinate all activities of the Alternate Unit and to monitor and administer the remaining



portion of the Bar Association contract. This includes overseeing the assignment of cases to private attorneys in areas where the Alternate Unit does not operate and audit their billings.

- Four senior trial attorneys who would be expected to handle any type of cases on relatively short notice in any of the three jurisdictions. These would be highly experienced attorneys with a sound litigation background capable of handling the most complex matters, as well as providing direction for the remainder of staff.
- Three journeyman trial attorneys who would primarily handle less serious felonies and some misdemeanors.
- Two intern attorneys who would handle the least complicated cases while gaining experience in the criminal justice system and learning litigation skills.
- One FTE law clerk and one-half FTE work study law clerks to handle research and motion drafting.
- Two journeyman investigators to handle all investigations for the unit.
- Six support staff, including an Administrative Assistant One, one legal stenographer, one secretary II, two specialist clerks. These would handle normal clerical/secretarial functions and work on the remainder of the Bar contract.





## SECTION IV

### ALTERNATE PUBLIC DEFENDER OPERATIONS IN OTHER COUNTIES

The proposed Alternate Public Defender's Office would be the third in California. The other two operations are located in Los Angeles and San Diego counties respectively. They are discussed here.

#### LOS ANGELES COUNTY

The Judicial Procedure Commission of Los Angeles County, a blue ribbon group of judges, public defenders, district attorneys, etc., assembled within the County of Los Angeles to study ways of improving efficiency in the justice system. In the very early 1980s they were studying the escalating costs of conflict attorneys in Los Angeles County and recommended a second Public Defender's Office. During the same period, the Los Angeles Public Defender's Office was forced to declare itself unavailable when its caseload reached certain levels due to lack of personnel. By the mid-1980s the costs had become so large that the Board of Supervisors created the Alternate Defense Counsel Office. This office was set up as a 501(c) non-profit organization.

The Los Angeles Alternate Defense Counsel Office was started in Van Nuys court with a staff of seven attorneys on a pilot project basis. It proved so successful that today it has expanded to eighty-two employees and is handling all conflicts, all overflow and all unavailability cases in eighteen municipal court districts, five superior court districts, and one juvenile court in Los Angeles County. It should be borne in mind that the District Attorney and Public Defender offices in Los Angeles County are huge. The Los Angeles Public Defender alone, for example, employs more than 597 full time lawyers, with an annual net county cost of \$71,908,000.

ADC'S Los Angeles caseload fluctuated dramatically in the last several years due primarily to the number of cases upon which the Public Defender declares himself unavailable. For example, in 1988, the Office of Alternate Defense Counsel handled 21,000 cases and in 1989 that figure dropped to 14,000. This large decrease was a result of staff increases in the Public Defender's Office which decreased the number of times they were "unavailable." Alternative Defense Counsel has remained cost effective even with the fluctuating caseload. It should be noted that the Alameda County Public Defender has yet to declare unavailability in any assigned case for reasons other than the traditional ethical conflict.

#### SAN DIEGO COUNTY

Prior to 1989, San Diego had a system very similar to Alameda County's for handling conflicts. Their Bar appointment program was administered by a county employed central administrator who assigned conflict cases to a bar panel consisting of about 350 attorneys. In late 1989 and early 1990, this program was costing around \$14,000,000 per year for about 17,000



conflict cases; an average of \$824 per case. A high percentage of these cases were juvenile court 300 cases. According to the local administrator, however, the biggest factor in the expense was the private attorney fee schedule.

In June, the Board of Supervisors voted to create an Alternate Defense Counsel office very much the same as described in this study, i.e., the Alternate Defender and all of the staff are county employees. This offers several advantages over the Los Angeles design. By creating a county office, existing experienced Public Defender staff can be attracted to the new operation without fear of losing their status as county employees. The new office can use non-General Fund money such as "Cortese" funds to defray some expenses. And finally, the county would have for the first time an internal department directly answerable to the CAO and Board for the large sums of money involved. The Alternate Defense Counsel in San Diego will start operations on January 1, 1991, with one-half year funding of \$1.5 million. The county has already appointed the head and two of the senior attorneys. Interviews are proceeding to hire the remainder of staff. When fully operational, that office will have forty-five full-time employees and a budget of about \$3.5 million a year. The San Diego ADC will be the primary provider of conflicts' counsel county wide. This will require them to staff five separate offices, a central office, a juvenile office, one in north county, one in El Cajon and one in South Bay.

By contrast the Alameda County Alternate Defender model used in this study for cost projection purposes is more modest in scope and more conservative in geographical dispersion. It will handle about 42 percent of the conflicts' cases. Cost effectiveness was given first priority in its design.



## SECTION V

### OTHER PROBLEMS TO BE ADDRESSED

This section discusses some problems which need to be addressed when implementing the pilot project. These include the "third" conflicts, the Bar carry-over costs, and the Bar criminal contract.

#### SPECIAL ANALYSIS FOR TERTIARY OR "THIRD" CONFLICTS

In some cases, the Public Defender's Office may file conflicts on more than one codefendant. For example, if three individuals were jointly charged with a crime, the Public Defender's Office would provide representation for the first and file a conflict for the second and third individuals. These two individuals would be entitled to independent counsel and therefore the Alternate Defense Unit would only be able to handle the second of the three individuals. The third would receive representation from an attorney appointed under the Bar contract method. The Data Processing Department created a special analysis (exhibit 10) to determine the frequency with which these tertiary conflicts occur in all municipal courts. For purposes of this study, the relevant courts were Berkeley, Oakland and Superior Court. Exhibit 3 shows the analysis of the frequency of third party conflicts in Berkeley, Oakland and Superior Court during 1989. About 16.7 percent of the Berkeley caseload involves a third conflict. In Oakland, it is about 8.4 percent and, in Superior Court, 0.8 percent.<sup>11</sup>

#### BAR CONTRACT CARRY-OVER COSTS

If the pilot project begins operation in Oakland, Berkeley, and Superior Court, there will still be a number of Bar cases in process. In order to identify carry-over costs associated with "winding down" the Bar contract in Berkeley, Oakland, and Superior Court, data from the Bar system was thoroughly analyzed by the Data Processing Department. Two separate reports were created, each attempting to measure a different aspect of the problem. The first report (exhibit 11) took all Bar cases by class in each jurisdiction and analyzed the length of time between opening and closing of the cases. This report indicates an extremely rapid closure of cases in both Berkeley and Oakland Municipal Court. In Berkeley, 71 percent of cases closed within 30 days and 95 percent within 120 days. In Oakland, 78 percent of cases closed within 30 days and 97 percent within 120 days. Even Superior Court shows little delay in most cases with a closure rate of 48 percent within 30 days and 94 percent within 120 days. The "disposition rates" of this report are summarized in exhibit 12.

The second report (exhibit 13) was more revealing and more narrowly targeted. This report looked at the number of cases of each class which were open on January 1, 1989. The

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<sup>11</sup> Superior Court is low since nearly all felony cases start in Municipal Court and the third conflict occurs there.





data from this report is summarized in exhibit 8 for Berkeley, Oakland and Superior Court. It shows the number of cases which were open by class on January 1, 1989, applies the average cost per case for those cases and arrives at a total cost for the carry-over cases. The 1989 data is then projected into 1990 figures, assuming a ten percent caseload increase and accounting for the six percent COLA in Bar fees. To obtain a projection for 1991, it was assumed that a ten percent caseload increase and a six percent COLA would occur again. This results in a projected carryover cost of \$438,865 in 1991 calendar year. This analysis tends to be a worse case scenario since it does not account for any partial payments which may have occurred on any of the cases. It thus assumes that the full average cost of each case will be a carry-over cost during the first year of operation.

### ALTERNATE DEFENSE UNIT START DATE

The present contract for criminal cases runs from January 1, 1990 through December 31, 1991. The contract for "civil" cases is separate and by its terms expires on July 1, 1991. The "criminal" contract does not by its terms require the county to refer all conflict cases to the Bar. The county could direct that the Alternate Defense Unit handle a portion of the caseload before the expiration of the Bar contract. The criminal contract may be regarded as an "Outputs and Requirements" contract which would entitle the Bar to the amount of work originally envisioned by the contract. The question then arises as to when the Bar Association would receive the amount of work envisioned in the contract.

The current criminal contract limits the attorney fees to \$2,998,369 for calendar year 1990. Calendar year 1991 is the same amount augmented by "the same percentage as the salary increase for public defender salaries." Assuming a six percent salary increase in 1991, the total contract fee amount would be \$3,178,271. Assuming that the contract is viewed as an "Outputs and Requirements" contract, then the Bar is entitled to receive \$3,178,271 worth of work in calendar year 1991.

If the Alternate Defense Unit is started during calendar year 1991, the Bar will still receive a substantial number of cases. Exhibit 14 assumes that the pilot project begins on July 1, 1991. It shows that the Bar would still receive \$3,490,455 worth of cases in calendar year 1991. Thus, even if the Bar Association contract is interpreted as an "Outputs and Requirements" contract, the Bar would nevertheless receive the contracted for sum even with the Alternate Unit commencing operations on July 1, 1991.



## SECTION VI

### STARTUP STAGES AND TIMING

This section discusses the steps and timeliness associated with starting the Alternate Public Defender office.

The earliest practical date for starting the Alternate Defense Unit is July 1, 1991. In order to achieve that date, the Board would need to approve the project and designate a director no later than March 1, 1991. The director, in turn, would have to hire an Administrative Services Assistant. These two individuals would be in a position to establish the office. Furniture, books, computer equipment, etc. needs to be ordered by April 15, 1991. Housing for the unit needs to be arranged with an occupancy date of June 1, 1991. The Director and Administrative Services Officer could be housed in any temporary office for the first few months. Informal discussions with GSA indicate that appropriate space may be available in the Lakeshore Building within that time frame. Data Processing needs to become involved in making minor alterations to the Gideon/Bar system so that Alternate Defense Unit cases may be tracked and costs calculated. Arrangements must be made with communications to purchase and install an appropriate phone system.

By June 1, the Director and Administrative Services Officer should move into their permanent quarters. This will allow them to supervise installation of computer equipment, phones, the arrival of furniture, etc., The Secretary II should start work on June 1 in order to coordinate the word processing environment. Likewise, the director must make arrangements to hire the four senior staff attorneys and one of the journeyman attorneys effective July 1. Another journeyman attorney would be hired each month until full staff is reached. The second secretary and second specialist clerk would be hired effective January 1, 1992 in order to absorb the additional work resulting from the Alternate Defense Unit's administration of the remaining portions of the of the Bar contract.

This staffing scenario assumes that the Alternate Defense Unit will take all conflict cases in the three target jurisdictions effective July 1, 1991. A staggered start was studied and determined to be inefficient. Any delay in the unit's ability to accept conflict cases will just result in them being referred to the Bar and those cases becoming part of the pipeline or carry-over costs. In any case, full attorney staffing is not needed on July 1 since the vast majority of cases referred to the unit will be new cases. For example, during the first two months there will be a very small practice in Superior Court since most felonies will still be in the Municipal Court stage of their proceedings. Similarly, there will be little trial practice in Superior Court for the first four months because the vast majority of cases will not have ripened to the point where litigation is contemplated.

July 1, 1991 is an ambitious startup date. San Diego County planned on a six month period to institute their Alternate Defense program and ended up requiring a nine month period. About three months of that delay was the result of conducting their search for a director.





Another part of the delay can be attributed to the scope of the San Diego operation which is county-wide in nature and involves six branch offices. The limited scope of the Alternate Defense Unit in Alameda County and the single office nature of its operation should make the four month schedule achievable.



## CONCLUSION

Whether or not to implement the Alternative Defense Unit project poses a number of difficult and sensitive policy issues for this Board's resolution. Among the three most important issues:

- (1) Vertical representation sometimes provides a superior defense in criminal cases.
- (2) There is a significant social value in having the private Bar well represented in the criminal courts.
- (3) The Bar contract with its graduated steps of experience for appointed lawyers who sign up for criminal appointments provides a valuable opportunity for new attorneys to get courtroom experience.

For example, it is true that in many cases, vertical representation provides a higher quality of representation for a given defendant, particularly when the assigned attorney is experienced, competent, and prepared. Attorney-client continuity is an important value. But there are other situations when the converse is true. When the assigned attorney is not experienced, vertical representation can be a trap because vertical representation systems rarely provide for supervision, file review, and ongoing training, all hallmarks of a well run Public Defender operation.

It is true that the reduction by about 42 percent of the number of conflict of interest cases referred to court appointed private attorneys will reduce the presence of the private Bar in this County's criminal courts. Some reduction of criminal defense business referred to new lawyers will result from the implementation of the ADU. This in turn may have an impact on the opportunity of new attorneys to get courtroom experience outside of the District Attorney, Public Defender, and Alternate Defense Unit offices.

There may well be other policy issues raised by Bar representatives. We do not regard any of these identified policy issues as insignificant. The debate on each of these issues raises important points, all worthy of careful consideration. This office has not taken a policy position on the ultimate issue, nor--except as indicated in these brief remarks--on the subsidiary policy issues.

Instead, we have attempted to focus this report and its accompanying findings on three concrete questions:

- (1) Will an Alternate Public Defender Unit be feasible, if structured as outlined here?
- (2) Will it be cost effective?

## CONCLUSIONS

The results of the present study indicate that the proposed model is a useful tool for understanding the factors that influence the effectiveness of the proposed model.

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- (3) How much will it save the county on an annualized basis after initial start-up costs and carry over billings from the Bar contract are phased out?

We have been persuaded by the data that the clear answer to the first two questions is, "Yes." To the third question, the approximate answer is one-half million dollars during the second full twelve months of operation.

A Public Defender organizational structure can clearly be applied to the conflict cases. The three identified court systems (Berkeley, Oakland, and Superior Court) offer a text book environment for an Alternate Defense Unit based on the Public Defender model. Although carry-over costs and one-time start-up costs will make net savings minimal or problematic during the start-up year, ongoing savings of \$500,000 per year or more are realistically expected thereafter. Expansion of the program to other areas of conflict cases can be carefully explored as the experience from initial operations accrues.

Jay B. Gaskill, Public Defender

Dean A. Beaupre, Chief Assistant





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(3) The first two pages of the report are devoted to a description of the project and the objectives of the study.

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A brief description of the project is given in the first page of the report. The second page is devoted to a description of the project and the objectives of the study. The third page is devoted to a description of the project and the objectives of the study.

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